IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID A. COHEN et al.	:	CIVIL ACTION
v.	:	
UNITED STATES OF AMERICA	:	NO. 03-3234

MEMORANDUM AND ORDER

Dalzell, J. April 9, 2004

In the motion now before us, the petitioners seek a stay of our Order of February 10, 2004, which granted the Government's motion for the summary enforcement of summonses directing SEI Private Trust Company to produce documents relating to a disability trust program it administered until September of 2003 on behalf of petitioner xélan, The Economic Association of Health Professionals.[1] See generally David Cohen v. United States, -- F.Supp.2d --, 2004 WL 250545 (E.D. Pa. Feb. 10, 2004).

Stay of an order enforcing a summons pending appeal is an "extraordinary remedy." United States v. Judicial Watch, Inc., 241 F.Supp.2d 15, 16 (D.D.C. 2003). A party seeking such a stay must satisfy a four-part balancing test:

> (a) the applicant [for the stay] must make a strong showing that he is likely to succeed on the merits of the appeal; (b) the applicant [must] establish that unless a stay is granted he will suffer irreparable injury; (c) no substantial harm will come to other interested parties; and (d) a stay would do no harm to the public interest.

1. At the same time, we denied the petitioners' motion to quash the summonses.

United States v. Manchel, Lundy & Lessin, 477 F.Supp. 326, 334-35 (E.D. Pa. 1979), quoting Bauer v. McLaren, 332 F.Supp. 723, 729 (S.D. Iowa 1971); United States v. Jones, 1999 WL 1057210, at *1 (D.S.C. Oct. 5, 1999).

For the reasons provided below, we conclude that the petitioners have failed to satisfy this standard.

In the first place, the petitioners argue that they are likely to succeed on appeal because Agent Marien's declaration does not expressly articulate the Government's contention that it may need to contact other disability trust participants to determine what xélan told them about the program and to determine, inter alia, whether "common risk factors such as the age, occupation, and health of the participants have any effect on the premiums and benefits under the program." Govt.'s Reply (Mot. Summary Enforcement) at 5.

As the Court of Appeals for the Seventh Circuit noted in the very case that the petitioners have cited, summons proceedings are meant to be summary in nature, and the Government's burden in establishing its prima facie case is not a heavy one. Miller v. United States, 150 F.3d 770, 772 (7th Cir. 1998). In view of this jurisprudence, we cannot conclude that Government's briefs must parrot the agent's affidavits, or that it generate these very different documents by cutting-and-pasting the latter into the former. What is required is an affidavit offering a sufficient -- and not necessarily exhaustive --

explanation of why the information the Service seeks may be relevant to the investigation.

The Government amply satisfied this requirement here. Agent Marien's declaration detailed the Service's difficulties in obtaining accurate and complete information about the operation of the trust. Moreover, it explained that the Service seeks records relating to other participants so that it can develop a complete understanding of how the disability trust operates, determine whether it is, in fact, a program of insurance, and calculate the qualified cost of the insurance it provides the Cohens. Marien Decl. ¶ 36-38;

The arguments in the Government's reply brief were reasonable glosses on Agent Marien's detailed explanation of why the Service cannot determine the Cohens' tax liability without a developing a full understanding of the workings of the trust, which in turn requires examination of documents relating to other participants. The jurisprudence in this area does not require more.

The petitioners also suggest that the fact that the Government articulated some of the reasons for enforcing the summonses in a reply brief somehow casts doubt on its bona fides. They neglect to mention that we solicited the reply brief in response to the petitioner's attempt to stipulate that other participants' records would not shed light on whether the disability trust is a program of insurance. The petitioners

cannot heap ashes on the Government for sharpening its arguments in response to their own litigation stratagem.

Finally, the petitioners appear to argue that we erred in declining to grant an evidentiary hearing at which they could have cross-examined Agent Marien on whether he would actually use the information gleaned from the SEI records to reconstruct the "actuarial underpinnings" of the disability trust. A hearing is warranted in summary enforcement proceedings only if the taxpayer has factually refuted material Government allegations or has factually supported an affirmative defense. United States v. Garden State Nat'l Bank, 607 F.2d 61, 71 (3d Cir. 1979).

As we explained in our memorandum opinion of February 10, 2004, the petitioners failed to satisfy this standard. Although they produced a sizeable body of evidence in support of their contention that the disability trust program is actuarially sound and satisfies the definition of insurance[2], they never refuted the Government's contention that the Service needs additional information to complete -- and then verify to its satisfaction -- its understanding of how the trust operates. As we also noted in February, the Government's showing in this regard was particularly strong because xélan and the Cohens have provided the Service with conflicting information about the trust

2. The petitioners have continued to build this record by soliciting the declaration of Ralph J. Sayre, an actuary from Alpharetta, Georgia. We have declined to consider this declaration because, as the Government notes, it is highly untimely.

and because xélan has shifted actual administration of the trust offshore.

The petitioners have also failed to establish that they will suffer irreparable harm if we decline to grant a stay. While they contend that enforcement of the summonses will likely result in the invasion of other xélan participants' privacy, the standard for obtaining a stay is whether the movants, and not similarly-situated individuals, will suffer irreparable harm.

Xélan's contention that enforcement of these summonses will irreparably harm its own reputation is more colorable but does not withstand close scrutiny. While enforcement of these summonses may harm xélan by leading some physicians to reconsider whether what we might diplomatically term xélan's more aggressive programs are indeed the road to tax-deferred riches (or, in xélanese, the accumulation of "critical capital mass"), any such squeamishness would, at most, merely add to the loss of reputation that xélan may already have suffered since the Service began its investigation. Not only has The New York Times covered this case, see Lynnley Browning, Judge Backs I.R.S. Effort to Get Tax Shelter Files, N.Y. Times, February 13, 2004, at C3, but the petitioners report that the Service has already opened audits on at least eighty other xélan participants. In sum, the cat is already out of the bag, and any incremental reputational harm xélan may sustain by enforcement of the summonses is no grounds for staying the Order.

Turning to the remaining elements of the petitioners' burden, we conclude that the interests of justice point away from granting their motion. As we note above, the conflicting information the petitioners have provided and the manner in which xélan has structured the disability trust have already frustrated the Service's efforts to conclude the Cohen audit, and the public has a strong interest in having the Service do its job promptly and completely. Accord Judicial Watch, 241 F.Supp.2d at 18.

In sum, xélan and the Cohens have not shown that a stay pending appeal is warranted here. However, we agree with the petitioners that a temporary stay is reasonable so that they can seek a stay from the Court of Appeals.

It is hereby ORDERED that:

1. Petitioners' motion for a stay pending appeal is DENIED;

2. Petitioners' request for a temporary stay pending their application for a stay from the Court of Appeals is GRANTED; and

3. Petitioners shall apply for such a stay by May 7, 2004.

BY THE COURT:

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Stewart Dalzell, J.